

17.0 APPLICABLE LAWS, REGULATIONS, PERMITS, AND DOE ORDERS

This chapter describes the laws, regulations, permits, and DOE orders that relate to the Proposed Action Alternative and the No Action Alternative. This chapter also details the conveyance and transfer process steps and required environmental compliance actions.

17.1 Introduction

As part of the NEPA process, the DOE must consider if actions discussed in this CT EIS would result in a violation of any Federal, State, or local laws or requirements (40 Code of Federal Regulations [CFR] 1508.27) or require a Federal permit, license, or other entitlement (40 CFR 1502.25). This chapter provides a summary of the regulations and regulatory processes pertaining to the DOE's proposed conveyance or transfer of the 10 tracts at Los Alamos, New Mexico. This chapter also lists the existing major environmental requirements, agreements, and permits that relate to the CT EIS No Action Alternative (that is, LANL keeps the land tracts). Most of these requirements, agreements, and permits are detailed in the LANL SWEIS (DOE 1999c). This chapter focuses on those specific to the transfer of the land tracts.

17.1.1 Conveyance and Transfer Process Steps

The DOE published its *Crosscut Guidance on Environmental Requirements for DOE Real Property Transfer* in October 1997 (DOE 1997c). This guidance discusses the procedures for identifying property for transferal; screening for potential use by other Federal, State, and local agencies; assessing the environmental baseline conditions; preparing any needed NEPA documentation; gaining General Services Administration (GSA) concurrence on determinations of excess property free of encumbrances; and

including contract and deed requirements. This guidance document provides direction for complying with the environmental requirements associated with the disposition of real property, including land and improvements on the land (such as buildings, roads, and other structures). It includes comprehensive discussions of the various Federal statutes, regulations, and DOE orders that may be involved in such disposal actions.

Section 1.4.2 of the Crosscut Guidance lists 10 statutes that grant the DOE limited authority to engage directly in real property transfers without engaging the Bureau of Land Management or the GSA disposal processes. An 11th statute, Section 632 of Public Law (PL) 105-119 (the Act), initiated the considered conveyance and transfer of the 10 subject tracts at Los Alamos and prescribed the overall conveyance and transfer process.

The process steps specific to the Act are enumerated in Chapter 1 of this CT EIS in Table 1.1.3-1, PL 105-119 Conveyance and Transfer Process Steps. However, as also noted in Chapter 1, these steps do not constitute the full set of steps that the DOE must take in order to reach final conveyance or transfer of the subject tracts. Several environmental compliance actions are necessary in addition to those required by either the Act or NEPA. These additional requirements include the need for

- Completion of an Environmental Baseline Survey Report to meet the requirements of the 1992 *Community*

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Environmental Response Facilitation Act amendments to the *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA), sections 120(h)(3) to 120(h)(5)

- Completion of consultation requirements under Section 7 of the *Endangered Species Act* (ESA) of 1973 and Section 106 of the *National Historic Preservation Act* (NHPA) of 1966
- Completion of consultation regarding traditional cultural properties (TCPs)
- Completion of compliance actions for 10 CFR 1022, DOE Compliance With Floodplains/Wetlands Environmental Review Requirements

Measures required to effect the environmental remediation and restoration of tracts with potential contamination issues are either ongoing at this time or would have to be initiated before the DOE makes a decision on the conveyance or transfer of the land involved. The environmental restoration process is discussed in Section 17.1.2. The Environmental Restoration Report (DOE 1999b) produced by the DOE in parallel to the CT EIS discusses the process required for the DOE to complete the appropriate restoration or remediation activities on the subject tracts.

Due to the timing of the decision process laid out in the Act, the completion of the DOE's Section 7, Section 106, and TCP consultation processes will be conducted after the County and San Ildefonso Pueblo have identified which of the tracts will be conveyed or transferred to each of the two recipient parties. This is a departure from the usual timing of the completion of these regulatory compliance actions, which normally occur before the NEPA analysis process is completed. The steps and timing of

the regulatory compliance efforts anticipated to take place after the completion of this CT EIS are discussed in Sections 17.1.3 and 17.1.4. Mitigation measures likely will be needed before conveyance or transfer of the tracts can be accomplished in order to mitigate potential adverse effects to sensitive cultural resources and animal species. These mitigation measures must be agreed upon by the parties involved and the regulatory agencies responsible for implementing the ESA and the NHPA. Such measures may include, but not be limited to, recovery of information and documentation of data, including photographic documentation. Mitigations also could include leaving archeological or historical resources untouched at this time or even burying archeological resources to better protect them. These potential mitigations are discussed in Chapter 16.

Chapter 18 contains copies of letters sent to various parties initiating the consultation processes required of the DOE under the ESA, NHPA, and various executive orders. The consultation and mitigation processes could require several years to complete and also could prove to be very expensive.

Actions to meet the procedural requirements of DOE (General Provisions) 10 CFR Part 1022, Compliance With Floodplain/Wetlands Environmental Review Requirements, have been undertaken by the DOE, both concurrently with and as part of the CT EIS process. Specifically, as provided for under the requirements of 10 CFR 1022, a Floodplain and Wetland Assessment was prepared and incorporated into the Draft CT EIS (see Appendix D); a separate Notice of Floodplain and Wetlands Involvement was published in the *Federal Register* (FR) (see a copy of this Notice in Appendix C); and a Statement of Findings is included in this Final CT EIS. No comments were received from members of the public regarding the Notice

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of Floodplain and Wetlands Involvement. The DOE is required to followup any mitigations that the DOE commits to in its Record of Decision(s), such as the imposition of deed restrictions on land conveyed to the County of Los Alamos. With the exception of followup action, the DOE has met the procedural requirements of 10 CFR 1022 with the publication of the Final CT EIS.

In addition to the above-mentioned action steps required of the DOE in order to convey or transfer the 10 subject tracts, the DOE must have the land surveyed to establish the legal definition of the tracts.

17.1.2 *Environmental Restoration Process*

An environmental restoration or cleanup process for radioactive contaminants is governed by DOE regulations and orders. An environmental restoration or cleanup process for hazardous contaminants is typically governed by the *Resource Conservation and Recovery Act* (RCRA) or the CERCLA and their associated regulations. These sets of regulations and orders govern how environmental contamination is defined, characterized, and remediated. While there are regulatory differences, they generally follow a common process. This common process includes the following steps:

- Initial assessment of suspected areas of contamination
- Preliminary risk assessment to estimate potential risks and needs for further sampling
- Preliminary prioritization of areas that should be characterized
- Planning and implementing a formal sampling and analysis program
- Risk assessment
- Drafting of recommendations based on the data as to how much

remediation, if any, is needed for each area

- Review and approval of these recommendations by the appropriate regulator
- Feasibility studies for alternative methods of remediation
- Implementation of remedial actions and post-remediation activities

For almost all of the area within the 10 tracts being evaluated for conveyance or transfer, the process is in the first or second step. LANL's Environmental Restoration (ER) Project is currently being conducted under RCRA in accordance with the NMED as directed by the EPA. The approval for RCRA methodologies is contained in the hazardous waste permit. All decisions and determinations associated with the ER Project are made in negotiations with the regulators. LANL currently plans to perform advance remedial actions (such as interim and voluntary corrective actions) where feasible.

17.1.3 *Ecological Consultation Process*

For the consultation procedures of the ESA and Section 7(c) of the 1978 amendments, the DOE has compiled information on seven threatened and endangered species that are present or potentially present on lands proposed for conveyance and transfer in order to assess possible effects on these species (PC 1998a). Regulations promulgated under Section 7 of the Act define the process whereby proposed Federal actions that may affect threatened and endangered species are evaluated by the U.S. Fish and Wildlife Service (USFWS). Because listed species are known to be present in some of the land tracts and thus may be impacted by implementation of the proposed action, the DOE cannot make any irreversible or irretrievable commitment of resources until

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the Section 7 consultation process is completed. The DOE will complete the Section 7 consultation process after the receiving parties and their proposed land uses are determined for the various land tracts.

The specific impact analysis and data will be addressed in a DOE-prepared Biological Assessment (BA) that is submitted to the USFWS. The BA will present the DOE effect determination that transfer and conveyance of certain land tracts would have on listed species. Three findings are possible: “no effect”; “may affect, not likely to adversely affect”; and “may affect, likely to adversely affect.” The USFWS, in turn, will issue its concurrence with the DOE’s determination, or a biological opinion if necessary, that states the USFWS opinion on whether or not the action is likely to jeopardize the continued existence of a listed species. Should the USFWS find that the proposal is likely to jeopardize a species, they will list reasonable or prudent alternatives or state that none are known. The DOE would then make a determination on how to proceed with the proposed action in light of its Section 7 obligations and BA. If the USFWS finds that the proposal is not likely to jeopardize a listed species, the DOE may proceed with the proposed action.

17.1.4 Cultural Consultation Process

Cultural resources that fall under the consideration of the NHPA, as amended, are located or are potentially located on lands proposed for conveyance and transfer. Under the NHPA, regulations define a process whereby the effects of the proposed undertaking (the conveyance and transfer) on cultural resources eligible for the National Register of Historic Places (NRHP) are considered and the Advisory Council on Historic Preservation is afforded a reasonable opportunity to comment. This process involves consultation between the DOE and

the New Mexico State Historic Preservation Office(r) (SHPO) to determine the effect of the undertaking on identified eligible cultural resources and appropriate mitigation measures to avoid or reduce any identified adverse effects. The DOE will not make any irreversible or irretrievable commitment of resources until this consultation process has been completed and any mitigation measures have been conducted. The DOE will complete the NHPA consultation process after the receiving parties and their proposed land uses are determined for the various land tracts.

The DOE has completed a 100 percent pedestrian survey and recording of all identified cultural materials for each of the parcels proposed for conveyance and transfer. This includes archaeological sites (prehistoric and historic) and buildings and structures. The DOE will conduct consultations with potentially interested Native American tribes to identify the presence of any TCPs located in the proposed parcels. This information, along with the DOE’s evaluation of eligibility of the identified resources and determination of the effect of the conveyance and transfer on eligible resources, will be presented to the SHPO for concurrence. The SHPO, in turn, will issue an opinion on the eligibility of resources and determination of effect within 30 days after receipt of the information. If the SHPO determines an adverse effect is likely, the SHPO and the DOE will consult to determine appropriate mitigation measures.

Currently, cultural resources located on DOE-administered land are addressed by other Federal mandates. These include the *American Indian Religious Freedom Act*, *Religious Freedom Restoration Act*, Executive Order 13007: “Indian Sacred Sites,” *Native American Graves Protection and Repatriation Act*, and the *Archaeological Resources Protection Act*. These acts and executive orders provide for (1) the protection of cultural resources;

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(2) access to cultural resources by Native American and other traditional practitioners; (3) repatriation of human remains, associated and unassociated funerary objects, sacred items, and items of cultural patrimony to affiliated descendants or Native American tribes; and (4) consultation with culturally affiliated Native American tribes regarding the excavation of archaeological sites and the treatment and disposition of excavated archaeological materials. The application of these pieces of legislation to cultural resources located in the proposed land tracts either will be removed or will be applied differently, depending on the legislation and who receives the particular tract of land, resulting in effects to the resources, traditional practitioners, and descendants or affiliated tribes. In order to determine the extent of these effects, the DOE will conduct extensive consultations with potentially interested Native American tribes to identify the presence of any cultural resources located in the proposed parcels that fall under the purview of these acts and executive orders. Consultations also will address the potential for effects due to changes in the application of these pieces of legislation. The DOE will not make any irreversible or irretrievable commitment of resources until this consultation process has been completed and any mitigation measures have been conducted. The DOE will complete this consultation process after the receiving parties and their proposed land uses are determined for the various land tracts.

17.2 DOE Regulatory Authorities for Environment, Safety, and Health

DOE regulations pertaining to environment, safety, and health are applicable for analysis in this CT EIS only if the No Action Alternative is selected for any or all of the land tracts under consideration. In other

words, they apply only if the DOE retains the land. The No Action Alternative is the same as the Expanded Operations Alternative in the LANL SWEIS (DOE 1999c). These regulations are listed in Table 17.2-1. Refer to the LANL SWEIS for detail about each directive.

17.3 Laws, Regulations, and Executive Orders Related to Environmental Planning and Consultation

Table 17.3-1 lists the laws, regulations, and executive orders related to environmental planning and consultation. Most of these directives pertain to the No Action Alternative, which is the same as the Expanded Operation Alternative in the LANL SWEIS. However, these laws also may apply to any land tracts that are conveyed or transferred to the U.S. Department of the Interior to be held in trust for San Ildefonso. Refer to the LANL SWEIS for details on each of these directives.

17.4 Laws, Regulations, and Executive Orders Related to Regulatory Environmental Protection and Compliance

The laws, regulations, and executive orders related to regulatory environmental protection and compliance are shown in Table 17.4-1 for air resources, Table 17.4-2 for water resources, and Table 17.4-3 for land resources. These laws may pertain to both the No Action Alternative and the Proposed Action Alternative, whether the tracts are conveyed or transferred to the County of Los Alamos or to the Department of the Interior. Refer to the LANL SWEIS for details of each directive.

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Table 17.2-1. DOE Regulatory Requirements for Environment, Safety, and Health

10 CFR Part 1022	Compliance with Floodplain/Wetlands Environmental Review Requirements
42 U.S.C. §2011 <i>et seq.</i>	<i>Atomic Energy Act</i> of 1954
DOE Order 451.1A	<i>National Environmental Policy Act</i> Compliance Program and related requirements, including: <ul style="list-style-type: none"> • 10 CFR Part 1021, DOE NEPA Implementing Procedures • 40 CFR Parts 1500-1508, Regulations Implementing the Procedural Provisions of NEPA
DOE Order 5400.1	General Environmental Protection Program
DOE Order 5400.5	Radiation Protection of the Public and the Environment
DOE Order 5820.2A	Radioactive Waste Management
DOE Order 1230.2	American Indian Tribal Government Policy

Note: U.S.C. = United States Code

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Table 17.3-1. Laws, Regulations, and Executive Orders Related to Environmental Planning and Consultation

35 FR 4247	Protection and Enhancement of Environmental Quality, Executive Order 11514, as amended by Executive Order 11991
36 FR 8921	Protection and Enhancement of the Cultural Environment, Executive Order 11593
42 FR 26951	Floodplain Management, Executive Order 11988
42 FR 26961	Protection of Wetlands, Executive Order 11990
59 FR 7629	Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Executive Order 12898
61 FR 26771	Indian Sacred Sites, Executive Order 13007
16 U.S.C. §470	<i>National Historic Preservation Act</i> , as amended
16 U.S.C. §470aa	<i>Archaeological Resource Protection Act</i> , as amended
16 U.S.C. §1531 <i>et seq.</i>	<i>Endangered Species Act</i> , as amended, and related requirements including: <ul style="list-style-type: none"> • 16 U.S.C. §703, <i>Migratory Bird Treaty Act</i> • 16 U.S.C. §668, <i>Bald Eagle Protection Act</i> • 17-2-37 <i>et seq.</i>, NMSA 1978, <i>New Mexico Wildlife Conservation Act</i>
25 U.S.C. §3001	<i>Native American Graves Protection and Repatriation Act</i> of 1990
42 U.S.C. §1996	<i>American Indian Religious Freedom Act</i> of 1978
42 U.S.C. 2000bb	<i>Religious Freedom Restoration Act</i> of 1993 (HR 1308)
42 U.S.C. §4321 <i>et seq.</i>	<i>National Environmental Policy Act</i> of 1969, as amended
Cooperative Agreements	<ul style="list-style-type: none"> • DE-FC04-93AL-97270, Los Alamos Pueblos Project, Recipient Santa Clara Pueblo • DE-FC04-94AL-99997, Los Alamos Pueblos Project, Recipient Jemez Pueblo • DE-FC04-94AL-99996, Los Alamos Pueblos Project, Recipient Cochiti Pueblo • DE-FC04-97AL-77460, Los Alamos Pueblos Project, Recipient San Ildefonso Pueblo • New Mexico Agreement in Principle, between the State of New Mexico and the U.S. Department of Energy
PL 102-484	<i>The National Defense Authorization Act</i> of 1993
Pueblo Accords	<ul style="list-style-type: none"> • Accord between the Pueblo of Cochiti and the U.S. Department of Energy • Accord between the Pueblo Jemez and the U.S. Department of Energy • Accord between the Pueblo of San Ildefonso and the U.S. Department of Energy • Accord between the Pueblo of Santa Clara and the U.S. Department of Energy

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Table 17.4-1. Air Resource Directives

43 FR 47707	Federal Compliance with Pollution Control Standards, Executive Order 12088, as amended by Executive Order 12580
20 NMAC 2.70	Operating Permits; General Provisions
20 NMAC 2.72	Construction Permits; Permit Processing and Requirements
20 NMAC 2.74	Permits—Prevention of Significant Deterioration; General Provisions
20 NMAC 2.78	Emission Standards for Hazardous Air Pollutants
42 U.S.C. §4901	<i>Noise Control Act</i> of 1972
42 U.S.C. §7401 <i>et seq.</i>	<i>Clean Air Act</i> , as amended
NMSA 74-2-1 <i>et seq.</i>	<i>New Mexico Air Quality Control Act</i>

Notes: FR = *Federal Register*, NMAC = New Mexico Administrative Code

Table 17.4-2. Water Resource Directives

40 CFR Part 110.6	Unplanned Discharges, Spills, and Releases
40 CFR Part 112	Oil Pollution Prevention
40 CFR Part 503	Standards for the Use or Disposal of Sewage Sludge
33 U.S.C. §1251	<i>Clean Water Act</i> , as amended, and related requirements including: <ul style="list-style-type: none"> • NMSA 74-6B-1 <i>et seq.</i>, <i>New Mexico Groundwater Protection Act</i> • NMSA 74-6-1 <i>et seq.</i>, <i>New Mexico Water Quality Act</i>
42 U.S.C. §300f	<i>Safe Drinking Water Act</i>
DOE 5400.1	General Environmental Protection Requirements
DOE 5400.5	Radiation Protection of the Public and the Environment
NPDES Permit NM0028355	Industrial and Sanitary Effluent Discharges at LANL
NPDES Permit NM0028576	Industrial Discharges from the Hot Dry Rock Geothermal Facility at LANL
NPDES Permit NMR00A384	General Permit for Storm Water Associated with Industrial Activity at LANL
Ordinance 85-70	Los Alamos County: “An Ordinance Repealing Chapter 15.16 of the Los Alamos County Code Adopting a New Chapter 17.70 Pertaining to Flood Damage Prevention”
Ordinance 1988-1	Santa Fe County: “An Ordinance to Establish Regulations for Development in Flood Hazard Areas, Set Minimum Floor Elevations for Compliance, Define Flood Plains, Address Required Building Improvements, and Establish Variance Regulations for Cases Where There Isn’t an Ability to Comply with Adopted Standards”
Ordinance 1996-1	Santa Fe County: “Flood Hazards”

Notes: U.S.C. = United States Code, NPDES = National Pollutant Discharge Elimination System

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Table 17.4-3. Waste Management, Toxic Substances, Pollution Prevention, and Environmental Restoration Directives

20 NMAC 5.1	Underground Storage Tanks, General Provisions
7 U.S.C. §136 <i>et seq.</i>	<i>Federal Insecticide, Fungicide, and Rodenticide Act</i> , and related requirements including: <ul style="list-style-type: none"> • 40 CFR Part 165, Procedures for the Disposal and Storage of Pesticides • 40 CFR Part 170, Worker Protection Standards
15 U.S.C. §2601 <i>et seq.</i>	<i>Toxic Substances Control Act</i>
42 U.S.C. §6901 <i>et seq.</i>	<i>Resource Conservation and Recovery Act</i>
42 U.S.C. §9601 <i>et seq.</i>	<i>Comprehensive Environmental Response, Compensation, and Liability Act</i> , as amended
42 U.S.C. §13101 <i>et seq.</i>	<i>Pollution Prevention Act</i> of 1990
49 U.S.C. §801 <i>et seq.</i>	<i>Hazardous Material Transportation Act</i> , and related requirements including: <ul style="list-style-type: none"> • 49 CFR Part 171, General Information, Regulations, and Definitions • 49 CFR Part 172, Hazardous Materials Tables, Special Provisions, Hazardous Materials Communications, Emergency Response Information, and Training Requirements • 49 CFR Part 173, General Requirements for Shipments and Packagings • 49 CFR Part 174, Carriage by Rail • 49 CFR Part 177, Carriage by Public Highway • 49 CFR Part 178, Specifications for Packagings
DOE 5400.5	Radiation Protection of the Public and the Environment
DOE 5820.2A	Radioactive Waste Management
PL 102-386, 106 Stat. 1505	<i>Federal Facility Compliance Act</i>

Notes: NMAC = New Mexico Administrative Code, U.S.C. = United States Code

17.4.1 Air Resources

Table 17.4-1 lists the directives related to air resources.

17.4.1.1 Council on Environmental Quality Draft Guidance Regarding Consideration of Global Climatic Change in Environmental Documents Prepared Pursuant to NEPA

The Council on Environmental Quality's draft guidance on global climate change is not

included in the LANL SWEIS and is described in detail here. The draft guidance specifically directs Federal agencies to review whether and to what extent continuing and proposed activities contribute directly or indirectly to greenhouse gases and climate change. In doing so, Federal agencies must consider the following two aspects of global climate change in their NEPA documents: (1) the potential for Federal actions to influence global climatic change (that is, increased emissions or sinks of greenhouse gases) and (2) the potential for global climatic changes to affect Federal actions (for

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example, feasibility of coastal projects in light of projected sea level rise). The guidance also suggests that the most meaningful analysis would be done not at the project level, but at the program level (that is, a programmatic EIS). Please refer to the Global Climate Changes sections for each tract under consideration for more information (Chapters 5 through 14).

17.4.2 Water Resources

Table 17.4-2 lists the directives related to water resources.

Presidential Memorandum on Xeriscaping, April 26, 1994

The Presidential Memorandum on Xeriscaping is not included in the LANL SWEIS and is described in here. This Memorandum directs Federal agencies to implement environmentally and economically beneficial practices on Federal landscaped grounds and to reflect these practices in appropriate NEPA documents. The guidance

recommends that NEPA documents reflect beneficial landscape practices, such as use of native plants; design, use, or promotion of construction practices that minimize adverse effects on the natural habitat; pollution prevention; water and energy efficiency; and creation of outdoor demonstration projects.

17.4.3 Waste Management, Toxic Substances, Pollution Prevention, and Environmental Restoration

Table 17.4-3 lists the directives related to waste management, toxic substances, pollution prevention, and environmental restoration.

17.5 Community Right-to-Know and Emergency Planning

Table 17.5-1 lists the directives related to Community Right-to-Know and Emergency Planning.

Table 17.5-1. Community Right-to-Know and Emergency Planning Directives

58 FR 41981	Federal Compliance with Right-to-Know Laws and Pollution Prevention Requirements, Executive Order 12856
42 U.S.C. §11001 <i>et seq.</i>	<p><i>Emergency Planning and Community Right-to-Know Act</i>, and related requirements including:</p> <ul style="list-style-type: none"> • 40 CFR Part 355, Emergency Planning and Notification • 40 CFR Part 370.21, Material Safety Data Sheet Reporting • 40 CFR Part 370.28, Inventory Reporting • 40 CFR Part 372, Toxic Chemical Release Reporting: Community Right-to-Know

Note: U.S.C. = United States Code